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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

ISABEL AVILA,

Defendant and Appellant.

C087087

(Super. Ct. No. 62151717)

ORDER DENYING
PETITION FOR
REHEARING AND
MODIFYING OPINION

[NO CHANGE IN
JUDGMENT]

THE COURT:

Appellant filed a petition for rehearing with this court. It is ordered that the nonpublished opinion filed herein on June 25, 2020, be modified as follows:

1. At page 2, in the first sentence of the first paragraph, delete “premeditating and deliberating” and replace it with “forming the requisite intent to kill” so that it reads:

Defendant appeals, arguing: (1) the trial court erred in failing to instruct the jury with CALCRIM No. 3428 (mental impairment) that the effects of intimate partner battering may have prevented her from forming the requisite intent to kill

2. At page 10, in the fourth sentence of the second paragraph, delete “premeditation and deliberation” and replace it with “the requisite intent to kill” so that it reads:

According to defendant, the instruction given here was incorrect in law because, by identifying the alleged mental impairment as anxiety disorder, it erroneously precluded the jury from considering the effects of intimate partner battering in deciding whether she acted with the requisite intent to kill.

There is no change in the judgment. Appellant’s petition for rehearing is denied.

BY THE COURT:

/S/

RAYE, P. J.

/S/

HULL, J.

/S/

RENNER, J.

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Defendant Isabel Avila stabbed her live-in boyfriend as he lay sleeping. She then turned the knife on her boyfriend's twin brother. A jury found defendant guilty of one count of attempted murder, one count of corporal injury to a cohabitant, and one count of assault with a deadly weapon—a knife. The jury found true allegations that the attempted murder was willful, deliberate, and premeditated and that defendant personally used a deadly weapon and inflicted great bodily injury under circumstances involving domestic violence. The trial court sentenced defendant to seven years to life plus eight years in state prison.

Defendant appeals, arguing: (1) the trial court erred in failing to instruct the jury with CALCRIM No. 3428 (mental impairment) that the effects of intimate partner battering may have prevented her from premeditating and deliberating; (2) insufficient evidence supports the jury’s finding that the attempted murder was willful, deliberate, and premeditated; (3) insufficient evidence supports her conviction for assault with a deadly weapon; (4) recently-enacted Penal Code section 1001.36 requires us to conditionally reverse the judgment and remand for a mental health diversion eligibility hearing;¹ (5) the trial court erred in imposing certain fines and assessments without determining whether she had the ability to pay them (see *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*)); and (6) her defense counsel rendered ineffective assistance in failing to preserve her claim of *Dueñas* error.²

We shall conditionally reverse the judgment and remand for further proceedings under section 1001.36. In all other respects, we shall affirm the judgment.

I. BACKGROUND

A. Events of April 7, 2017

Defendant lived in Lincoln with her boyfriend, M., and his identical twin brother, P. M. and P. were home alone on the afternoon of April 7, 2017. They spent several hours watching television and discussing M.’s relationship with defendant, which M., who was drinking, wanted to end. They agreed that defendant was “bad news,” and should move out.

Defendant returned from work later that day. She argued with M., who was by then very drunk. Defendant told M. he should “find another girlfriend,” or “just go back” to an ex-girlfriend, J. M. responded that defendant should consider looking for another place to live.

¹ Undesignated statutory references are to the Penal Code.

² Defendant has withdrawn a claim of error with respect to the sentence for count three.

P. retired to his bedroom, where he continued to watch television. After some time, defendant appeared at P.'s bedroom door and said, "You can't get rid of me, you can't kick me out, I got rights." M. intervened and calmed defendant down. M. then announced that he was going to bed. He left P.'s room, followed by defendant. A short time later, defendant returned to P.'s room and apologized for being "such a bitch."

M. went to the master bedroom (which he shared with defendant) to prepare for bed. Defendant followed M. into the room and apologized again for "being a bitch." She then left, saying she was going to watch television in the family room. M. took off his glasses and went to sleep. It was before 9:00 p.m., which was around the time the household usually went to bed.

Defendant returned to P.'s room. She asked P. whether he wanted to watch television with her. P. demurred. Defendant then exchanged a series of text messages with her ex-husband and daughter, beginning at 9:03 p.m. First, she texted to her ex-husband, E., stating: "The legal war ha[s] begun."³ When asked to explain, she elaborated: "Between both dickheads, one dickhead told me to get the fuck out." Next, she texted her daughter, stating: "One dickhead, [M.], told me to get the fuck out." Then, she sent another message to E., stating: "I told them fuck off."⁴

A short time later, M. was awakened by a "thump." He opened his eyes and saw defendant on top of him, making a stabbing motion with her arm. She was saying, "You're not getting me out of here easy" or "I'm not leaving out of here easy." M. realized he was bleeding. He managed to get out of bed and make his way to the kitchen.

³ There was evidence at trial that defendant believed she had an ownership interest in the house.

⁴ Although defendant was no longer married to E., there was evidence she remained in regular contact with him.

P., still in his room, heard a high-pitched sound, followed by the sound of M. calling his name. P. emerged from his room in time to see M. staggering towards the kitchen island and bleeding profusely. M. told P., “She killed me. I’m dead.” M. then collapsed onto the floor and lost consciousness.

P. knelt on the floor, trying to render aid to his wounded brother. He heard defendant saying, “ ‘You can’t get rid of me. You can’t kick me out. I have rights.’ ” He turned and saw defendant advancing towards him with a large kitchen knife clenched in her upraised right fist. P. grabbed the knife from defendant and ran next door to summon help.

Defendant called 911 at 9:29 p.m. Defendant told the 911 operator, “I’m calling ‘cause my boyfriend tried to kill me.” When asked to elaborate, defendant explained, “We got in a fight because he doesn’t want me in the house.” She then addressed M., stating: “Fuck you, [M.] Fuck you, fucker.” When asked what happened, defendant responded: “I fuckin’ grabbed [a] knife and he was trying to stop me and has been telling me to get the fuck out and I - I just can’t do it anymore.” Later, defendant volunteered, “I defended myself and I just got tired of it, all the abuse every day, I’m just tired of it.”

Paramedics arrived and transported M. to the hospital, where he was treated for multiple stab wounds, including two to his chest and one to his forehead. Both chest wounds were life-threatening. M. had a three to four-inch laceration on his right forearm, consistent with a defensive wound. M.’s ear had also been partially severed.

Police contacted defendant at the neighbor’s house. Defendant reported that she had a cut on her hand and an injured toe. When asked what happened, defendant responded, “ ‘I don’t remember.’ ” Defendant was taken to the hospital and treated for abrasions to the palm of her hand and a non-displaced fracture on her toe.

B. Charges and Jury Trial

Defendant was arrested and charged by information with one count of attempted murder (§§ 664/187, subd. (a)—count one), one count of corporal injury on a cohabitant (M.) (§ 273.5, subd. (a)—count two), and one count of assault with a deadly weapon (a knife) upon P. (§ 245, subd. (a)(1)—count three). The attempted murder was alleged to have been premeditated, willful, and deliberate (§ 189), and sentence enhancements for great bodily injury involving domestic violence (§ 12022.7, subd. (e)) and personal use of a deadly weapon (a knife) (§ 12022, subd. (b)(1)) were attached to counts one and two.

The matter was tried to a jury in December 2017. During the trial, prosecution witnesses—primarily M. and P.—testified substantially as described *ante*. Defendant testified in her own defense. She admitted stabbing M., but claimed to have acted in self-defense. In defendant’s version of events, she came home from work that to find M. drunk. An argument ensued. M. urged defendant to smoke marijuana with him. Defendant refused. Eventually, defendant retired to the master bedroom, got into bed, and started watching television.

According to defendant, M. entered the bedroom a short time later, with marijuana and smoking accessories in hand. M. continued to pressure defendant to smoke marijuana, and defendant continued to refuse, prompting M. to call her a “cunt” and “fucking bitch.” After a while, M. left the room. It was then, in defendant’s telling, that she texted her ex-husband and daughter.

According to defendant, M. returned to the master bedroom sometime later, carrying a kitchen knife. M. started poking defendant with the knife and demanding that she perform oral sex on him. In defendant’s words, “He was threatening me with the knife, and I just told him to give me the knife, and he wouldn’t give me the knife. I grabbed it. We just started fighting over the knife.” Defendant testified she feared for her life and injured her hand and toe in the struggle for the knife. When the struggle was over, she said, she followed M. out of the room, saw P., and gave him the knife. She then called 911.

Defendant testified she was no stranger to domestic abuse, having been raised by an abusive father. She recounted an incident in which she was kidnapped and assaulted by an acquaintance in the 1990's, when she was 19 or 20 years old. She also testified she had been physically abused "almost every day" by her ex-husband, E. On one occasion, in 1997, defendant called police after an argument with E. became physical. On another occasion, in 2004, police were called when E. got into a fight with defendant's then-boyfriend, and defendant was struck trying to break them up.

Defendant recalled that E. abused drugs and alcohol during their marriage. According to defendant, M. had been drinking heavily in the months leading up to the stabbing and exhibiting aggressive behavior, which reminded her of E. The couple fought frequently during this period and talked about breaking up on more than one occasion.

Defendant admitted on cross-examination that she never told investigating officers that M. demanded oral sex at knifepoint in the moments leading to the stabbing. Defendant was unable to explain how she managed to wrest the knife from M. (who was substantially larger than she), and could not account for the stabbing or partial severing of M.'s ear, other than to say, "It all happened fast."

Physician's assistant Bruce Roe testified that he examined defendant in January 2017, several months before the stabbing. According to Roe, defendant complained of heart palpitations and underwent an EKG, which was normal. Defendant was eventually diagnosed with an anxiety disorder and given a prescription for Lexapro. She returned to the clinic some two months later, still complaining of anxiety, and received a prescription for Xanax. Neither Roe nor any other health care professional asked defendant about domestic violence or other stressors at home, and defendant did not indicate that she was experiencing any such problems.

David Cropp, a former police sergeant and supervisor of the Sacramento Police Department's family abuse unit, testified as an expert on intimate partner battering and its

effects.⁵ Cropp interviewed defendant, reviewed relevant police reports (including reports regarding the long-ago incidents involving E.), and listened to defendant's trial testimony, and concluded, on the basis of all available information, that she was a victim of intimate partner battering at the time of the stabbing. Cropp explained that defendant was "still recovering" from the effects of intimate partner battering by E. when she met M., and was susceptible to manipulation by new partners. Although there were no reported incidents of domestic abuse by M. or P., Cropp opined that both were emotionally abusive and controlling. Among other things, Cropp opined that M. and P. subjected defendant to "financial abuse" by pressuring her to contribute financially to the household. Cropp also opined that M. and P. isolated defendant by demanding that her adult son move out of the Lincoln house.

Cropp opined that M. tried to control defendant by pressuring her to use drugs and alcohol. Cropp further opined that the atmosphere in the house was consistent with the "cycle of violence," in which "there would be tension in the forms of drinking and insults and profanity, references to past girlfriends, demeaning, demoralizing comments, an acute violent episode, which would be the profanity and verbal abuse, followed by, perhaps, an apology the next day[.]"

Cropp explained that victims of intimate partner battering commonly suffer from anxiety, and frequently exhibit hypervigilance, a state of mind associated with impulsivity. According to Cropp: "The primitive part of the brain is impulsive, fast, it's designed to keep us alive in the moment, versus the cognitive brain. The higher order neurocognition is slow and thoughtful and methodical in a planning organized perspective of the brain. This is the part of the brain that's involved in hypervigilance,

⁵ "Although often referred to as 'battered women's syndrome,' 'intimate partner battering and its effects' is the more accurate and now preferred term. [Citations.]" (*In re Walker* (2007) 147 Cal.App.4th 533, 536, fn. 1.)

and trauma is that part of the brain that reacts impulsively.” In Cropp’s opinion, defendant was a victim of intimate partner battering by M., and was experiencing hypervigilance at the time of the stabbing.

C. Verdict and Sentence

The jury found defendant guilty as charged and found all enhancements true. The trial court sentenced defendant to seven years to life plus eight years in state prison, as follows: seven years to life for attempted premeditated murder (§§ 664/187—count one), plus four years for the great bodily injury enhancement (§ 12022.7, subd. (e)), one year for the deadly weapon enhancement (§ 12022, subd. (b)(1)), and three years consecutive for assault with a deadly weapon (§ 245, subd. (a)(1)—count three). The trial court stayed the sentence of three years for corporal injury on a cohabitant (§ 273.5, subd. (a)—count two), plus four years for the great bodily injury enhancement and one year for the deadly weapon enhancement, pursuant to section 654. The trial court also imposed various fines, fees, and assessments, as set forth *post*.

This appeal timely followed.

II. DISCUSSION

A. CALCRIM No. 3428

The trial court instructed the jury with a modified CALCRIM No. 3428, which read, in pertinent part, as follows: “You have heard evidence from Mr. Bruce Roe, a Physician Assistant at Rocklin Family Practice[,] that the defendant may have suffered from an [a]nxiety [d]isorder. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for the crimes of [a]ttempted [m]urder and [a]ttempted [v]oluntary [m]anslaughter.” Defendant argues the trial court erred in failing to instruct the jury that it could consider evidence of intimate partner battering in deciding whether she acted with the required state of mind. We disagree.

1. Additional Background

Defendant originally requested the pattern version of CALCRIM No. 3428, which provides, in pertinent part: “You have heard evidence that the defendant may have suffered from a mental [disease, defect, or disorder]. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted . . . with the intent or mental state required for that crime.”

During an instructions conference, defense counsel explained: “I think the evidence from Dr.—Mr. Bruce Roe is [defendant] had an anxiety disorder and was taking medications, and that that kind of mental health issue should be something the jury can consider within the meaning of this instruction, 3428.” Defense counsel said nothing to suggest that CALCRIM No. 3428 was justified by evidence of intimate partner battering. The prosecutor objected to CALCRIM No. 3428 on the ground that no evidence had been adduced showing that defendant had a mental disease, defect, or disorder. The trial court chose to defer ruling on the issue.

The trial court returned to CALCRIM No. 3428 in a subsequent instruction conference. Once again, defense counsel argued the instruction was warranted by Roe’s testimony that defendant was suffering from an anxiety disorder. As before, there was no suggestion that CALCRIM No. 3428 was warranted by Cropp’s testimony that defendant was a victim of intimate partner battering. The trial court agreed that CALCRIM No. 3428 should be given, but stated the instruction should be “tuned up a little bit” to specify the alleged mental impairment.

Defense counsel submitted a proposed modified CALCRIM No. 3428 the next day. The proposed modified instruction refers solely to Roe’s testimony that defendant may have suffered from an anxiety disorder. The proposed modified instruction makes no mention of intimate partner battering.

The trial court ultimately gave a modified CALCRIM No. 3428, incorporating defendant’s changes to the beginning of the instruction (at issue here) and other

modifications not relevant here. The trial court also instructed the jury with CALCRIM No. 851 on the use of evidence of intimate partner battering and its effects.

2. *Analysis*

We begin with the People's argument that defendant's claim of instructional error has been forfeited. The parties agree that the trial court had no *sua sponte* duty to instruct the jury on mental impairment as a result of intimate partner battering. (*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1406.) However, defendant urges that the trial court, having undertaken to give such an instruction, had a duty to do so correctly. (*Ibid.*) According to defendant, the instruction given here was incorrect in law because, by identifying the alleged mental impairment as anxiety disorder, it erroneously precluded the jury from considering the effects of intimate partner battering in deciding whether she acted with premeditation and deliberation.

The People correctly observe that defense counsel failed to object to the trial court's request that he modify the pattern instruction to specify defendant's alleged mental impairment, and affirmatively proposed the very language now said to have been error. Even so, we "may review defendant's claim of instructional error, even absent objection, to the extent [her] substantial rights were affected." (*People v. Townsel* (2016) 63 Cal.4th 25, 59-60 (*Townsel*) [considering erroneous instruction with precursor to CALCRIM No. 3428 despite defendant's failure to object]; § 1259 [we "may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; § 1469 [same].) Whether a defendant's substantial rights were affected, of course, can only be determined by deciding if the instruction was flawed and, if so, whether the error was prejudicial. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [forfeiture rule does not apply to incorrect statements of law].) Thus, we must necessarily consider the merits of defendant's claim, which we do independently, under the *de novo* standard. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

“CALCRIM No. 3428 is a pinpoint instruction that must be given only if requested by the defendant, and only if substantial evidence supports the defense theory that defendant’s mental disease or disorder affected the formation of the relevant intent or mental state. [Citation.] Also, expert medical opinion testimony is necessary to establish that a defendant suffered from a mental disease, mental defect, or mental disorder within the meaning of CALCRIM No. 3428, because jurors cannot make such a determination from common experience.” (*People v. Larsen* (2012) 205 Cal.App.4th 810, 824 (*Larsen*); see also *People v. Moore* (2002) 96 Cal.App.4th 1105, 1117 [“Expert medical testimony is necessary to establish a defendant suffered from a mental disease, mental defect, or mental disorder because jurors cannot make such a determination from common experience”].)

Here, there was substantial evidence that defendant suffered from an anxiety disorder, as to which defendant makes no claim of instructional error. There was also substantial evidence that intimate partner battering may be correlated with anxiety, hypervigilance, and impulsivity. But there was no evidence, let alone substantial evidence, that intimate partner battering constitutes a standalone mental health diagnosis that would warrant a mental impairment instruction. Neither Roe nor Cropp said anything to suggest that intimate partner battering can or should be considered a mental disease or disorder, and neither was offered as a mental health expert in any event.⁶ That intimate partner battering may be highly correlated with mental illness (such as anxiety

⁶ Roe, a physician’s assistant at a family practice clinic, testified as a percipient witness regarding defendant’s diagnosis and treatment for anxiety disorder. Roe did not discuss intimate partner battering with defendant. Cropp, a former police sergeant and supervisor of the family abuse unit, was offered as “an expert in the identification of persons who have suffered [i]ntimate [p]artner [b]attering and its effects, including the nature and effects of physical, emotional, and mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence.” Although Cropp is also an associate clinical social worker, he did not purport to diagnose defendant with a mental impairment or opine that intimate partner battering amounts to a mental impairment.

disorder) or mental health symptoms (such as hypervigilance and impulsivity) does not mean that intimate partner battering is itself a mental illness.⁷ We cannot conclude, from the record before us, that intimate partner battering is a “recognized mental diagnosis that warrants a mental disorder instruction.” (*Larsen, supra*, 205 Cal.App.4th at p. 825, fn. 11 [mental impairment instruction should have been given where expert evidence showed the defendant suffered from Asperger’s Syndrome, a diagnosis that appeared in the then-current version of the Diagnostic and Statistical Manual of Mental Disorders].) We therefore reject the claim of instructional error.⁸

B. Sufficiency of Evidence of Premeditation and Deliberation

Defendant contends there was insufficient evidence to support the jury’s finding that the attempted murder of M. was deliberate and premeditated. We are not persuaded.

When considering a claim of insufficient evidence, we review “ ‘the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid

⁷ We take judicial notice, on our own motion, of the fact that intimate partner battering does not appear in the current version of the Diagnostic and Statistical Manual of Mental Disorders. (American Psychiatric Assn., Diagnostic & Statistical Manual of Mental Disorders (5th ed. 2013).)

⁸ Defendant directs our attention to *Doe v. Superior Court* (1995) 39 Cal.App.4th 538 (*Doe*), in which the appellate court considered an indigent capital defendant’s request for appointment of an expert on intimate partner battering. (*Id.* at p. 541.) In holding that the defendant demonstrated a need for such an expert, the court observed in dicta that: “Expert testimony on BWS [battered women’s syndrome] and PTSD [posttraumatic stress disorder] is routinely admitted in criminal trials in California and other states and no one suggests they are not recognized psychiatric conditions.” (*Id.* at p. 541, fn. 2.) The *Doe* court did not address the question before us, i.e., whether intimate partner battering (or battered women’s syndrome) amounts to a mental disease or disorder within the meaning of CALCRIM No. 3428, and does not compel the conclusion that such an instruction was required here as a matter of law. (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155 [“ ‘An appellate decision is not authority for everything said in the court’s opinion but only “for the points actually involved and actually decided” ’ ”].) Defendant’s other authorities are equally inapposite.

value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” ’ ’ (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) We “ ‘must accept logical inferences that the jury might have drawn from the evidence even if [we] would have concluded otherwise.’ ” (*Ibid.*) We do not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

“A crime is premeditated when it is considered beforehand and deliberate when the decision to commit the crime is formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [Citations.] [¶] The process of deliberation and premeditation does not require any extended period of time: ‘ “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly” ’ [Citations.] The requirement of premeditation and deliberation excludes acts that are the ‘result of mere unconsidered or rash impulse hastily executed.’ ” (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 886-887.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), our Supreme Court identified three categories of evidence that are typically sufficient to sustain a finding of premeditation and deliberation: (1) planning evidence; (2) motive evidence; and (3) a manner of killing (or attempted killing) from which the jury could reasonably infer a deliberate intent to kill. These factors need not be present in “some special combination” or “accorded a particular weight” (*People v. Pride* (1992) 3 Cal.4th 195, 247), and “it is not essential that there be evidence of each category to sustain a conviction” (*People v. Gonzalez, supra*, 210 Cal.App.4th at p. 887). Rather, the factors are “simply intended to guide an appellate court’s assessment whether the evidence supports an inference that the [attempted] killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse.” (*People v. Pride, supra*, at p. 247.)

There was ample evidence of the type identified in *Anderson* from which the jury could have found that defendant acted with premeditation and deliberation. With respect to planning, M. testified he went to sleep and awoke to find defendant on top of him, making a stabbing motion with her arm. He then discovered he was bleeding. From this evidence, the jury could reasonably infer that defendant engaged in planning activity by going to the kitchen, selecting a large knife, and making her way to the bedroom with knife in hand. (*People v. Sanchez* (1995) 12 Cal.4th 1, 34 [retrieving knife from kitchen is evidence of planning], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The jury could also reasonably infer that defendant engaged in planning activity by assuming an attack position above the sleeping M., and stabbing him without provocation. (See *People v. Miller* (1990) 50 Cal.3d 954, 993 [“lack of provocation by the victims similarly leads to an inference that the attacks were the result of a deliberate plan rather than a ‘rash explosion of violence’ ”].)

With respect to motive, the evidence showed that defendant believed she had an ownership interest in the Lincoln house and was angry about being kicked out. Indeed, M. and P. both testified that defendant was inveighing against the contemplated eviction during the actual attack. The evidence also showed that defendant was jealous of M.’s perceived interest in other women, especially his ex-girlfriend, J. The jury could reasonably infer from this evidence that defendant had a motive to kill M., either in retaliation for being kicked out, out of jealousy, or some combination of the two. (See *People v. Kovacich* (2011) 201 Cal.App.4th 863, 893 [“evidence showing ‘quarrels, antagonism or enmity between an accused and the victim of a violent offense is proof of motive to commit the offense’ ”]; *People v. Disa* (2016) 1 Cal.App.5th 654, 666 [motive for killing shown by evidence defendant was depressed about the end of his relationship with the victim, was angry at her, and was jealous of her relationship with another]; *People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1117 [evidence of sexual jealousy was one of several motives for killing]; *People v. Williams* (2018) 23 Cal.App.5th 396, 410

[defendant's "rage at the collapse of" his marriage to the victim provided evidence of motive].)

Finally, the manner in which defendant committed the attempted murder supports a finding of premeditation and deliberation. Defendant stabbed M. as he lay sleeping, raising an inference that the attack was deliberate rather than spontaneous. (Cf. *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957 [execution style killing with no evidence of struggle supported conclusion that murder was premeditated and deliberate rather than impulsive], disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) She plunged the knife into M.'s chest twice, inflicting life-threatening injuries each time. (*Anderson, supra*, 70 Cal.2d at p. 27 ["directly plunging a lethal weapon into the chest evidences a deliberate intention to kill"].) Even assuming the first blow was spontaneous, the jury could reasonably infer that repeated blows to M.'s vital areas demonstrated a calculated design to ensure death, rather than an unconsidered "explosion" of violence. (*People v. Pride, supra*, 3 Cal.4th at p. 248 [number and placement of stab wounds near the victim's heart was factor from which "the jury could infer [the victim's] death was calculated and was not the product of an unconsidered explosion of violence"].) Thus, the manner of the attempted murder—like the other *Anderson* factors—also supports an inference that defendant acted with deliberation and premeditation.

C. Sufficiency of Evidence of Assault with a Deadly Weapon

Next, defendant argues there was insufficient evidence to support her conviction for assault with a deadly weapon against P., as alleged in count three. Again, in reviewing a challenge to the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence to support the jury's findings. (*People v. Streeter, supra*, 54 Cal.4th at p. 241.) As before, we conclude that substantial evidence supports the jury's verdict.

to produce death or great bodily injury.’ ” (Id. at p. 533.) This requires more than a mere possibility that serious injury could have resulted from the object used. (Ibid.)

Second, conjecture as to how the object might have been used is not permitted. (*B.M., supra*, 6 Cal.5th at p. 534.) “Rather, the determination of whether an object is a deadly weapon under section 245, subdivision (a)(1) must rest on evidence of how the defendant actually ‘used’ the object.” (*Ibid.*) Although “it is inappropriate to consider how the object could have been used as opposed to how it was actually used,” the Supreme Court explained, “it is appropriate in the deadly weapon inquiry to consider *what harm could have resulted from the way the object was actually used*. Analysis of whether the defendant’s manner of using the object was likely to produce death or great bodily injury necessarily calls for an assessment of potential harm in light of the evidence. As noted, a mere possibility of serious injury is not enough. But the evidence may show that serious injury was likely, even if it did not come to pass.” (*Id.* at p. 535, italics added.)

Third, “limited injury or lack of injury may suggest that the nature of the object or the way it was used was not capable of producing or likely to produce death or serious harm.” (*B.M., supra*, 6 Cal.5th at p. 535.) Nevertheless, an aggravated assault conviction does not require proof of any injury or even physical contact. (*Ibid.*)

Applying these principles, we conclude that substantial evidence supports the conclusion that defendant used the kitchen knife as a deadly weapon in a manner likely to produce great bodily injury under section 245, subdivision (a)(1). As noted, P. testified that he was kneeling on the floor tending to M. when he heard defendant saying, “ ‘You can’t get rid of me. You can’t kick me out. I have rights.’ ” He turned and saw defendant moving towards him with a large kitchen knife clenched in her upraised, right fist. The evidence at trial showed that the knife was the largest in the kitchen butcher block, with a blade measuring eight inches. The evidence also showed that defendant is right-handed. P. testified that he moved towards defendant, grabbed her right hand with

his left hand, and took the knife. In P.'s words, the knife "just slipped right into my hand." Defendant growled in anger, and P. went next door to summon help.

Defendant argues the evidence was insufficient to support the conviction for assault with a deadly weapon as there was no evidence she stabbed or even jabbed at P. with the knife. However, "the evidence may show that serious injury was likely, even if it did not come to pass." (*B.M.*, *supra*, 6 Cal.5th at p. 535.) Thus, we may consider the injuries that likely would have resulted from the way defendant actually used the knife. (*Ibid.*) Here, the evidence showed that defendant repeatedly stabbed M. with a large kitchen knife, and then advanced on P., who was in a vulnerable position on the floor, with the same knife clenched in her upraised, dominant fist. On the record before us, the jury could reasonably infer that, but for his defensive maneuvers, P. would have been stabbed as well, resulting in serious bodily injury or death. As the Supreme Court observed in *B.M.*, "an aggressor should not receive the benefit of a potential victim fortuitously taking a defensive measure or being removed from harm's way once an assault is already underway." (*Id.* at p. 537; see also *People v. Koback* (2019) 36 Cal.App.5th 912, 925 [substantial evidence supported finding the defendant used car keys in manner capable of causing and likely to result in great bodily injury, though keys did not make contact with anyone].) From the way defendant wielded the knife, we conclude P. would have likely suffered serious bodily injury had he not succeeded in disarming her, and therefore, the evidence supports the conclusion that defendant used the knife in a manner that was both capable of producing and likely to produce serious bodily injury, as indeed, it did, only moments before. (*B.M.*, *supra*, at pp. 534-535.) We therefore reject the claim of error.

D. Pretrial Mental Health Diversion

Next, defendant argues that section 1001.36, which allows pretrial mental health diversion, applies retroactively to her case, and requires remand for a diversion hearing. The People respond that section 1001.36 operates prospectively only. Our Supreme Court has resolved this issue in defendant's favor. (*People v. Frahs* (June 18, 2020, S252220) __Cal.5th__ [2020 Cal. LEXIS 3736] (*Frahs*).) Following *Frahs*, we shall conditionally reverse the judgment with directions for the trial court to consider defendant's eligibility for mental health diversion under section 1001.36. We express no view as to whether defendant will be able to show eligibility on remand or whether the trial court should exercise its discretion to grant diversion if it finds her eligible.

E. Fines, Fees, and Assessments

The trial court imposed various fines, fees, and assessments, including a \$10,000 restitution fine (§ 1202.4), a \$120 court operations assessment (§ 1465.8), and a \$90 court facilities assessment (Gov. Code, § 70373).⁹ Relying on *Dueñas*, defendant argues the imposition of these fines, fees, and assessments without an ability-to-pay hearing was a violation of her right to due process. The People respond that defendant forfeited her *Dueñas* challenge by failing to object in the trial court. We are not persuaded that the analysis used in *Dueñas* is correct.

Our Supreme Court is now poised to resolve this question, having granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844, which agreed with the court's conclusion in *Dueñas* that due process requires the trial court to conduct an ability to pay hearing and ascertain a defendant's ability to pay before it imposes court facilities and court operations assessments under section

⁹ Defendant was ordered to pay additional fines and fees, including a \$10,000 parole revocation fine (§ 1202.45), and restitution in the amount of \$21,481 to the Victim Compensation Government Claims Board (§ 1202.4, subd. (f)(2)). Defendant does not challenge these amounts on appeal.

1465.8 and Government Code section 70373, but not restitution fines under section 1202.4. (*Kopp, supra*, at pp. 95-96.)

In the meantime, we join those authorities that have concluded the principles of due process do not require determination of a defendant's present ability to pay before imposing the fines and assessments at issue in *Dueñas* and in this proceeding. (*People v. Kingston* (2019) 41 Cal.App.5th 272, 279; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, rev. granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 928.) Having done so, we reject defendant's *Dueñas* challenge to the above-referenced fines, fees, and assessments and the derivative claim of ineffective assistance of counsel.

III. DISPOSITION

The judgment is conditionally reversed. The matter is remanded to the trial court with directions to hold a diversion eligibility hearing under section 1001.36. If the trial court finds defendant eligible under that statute, the court may grant diversion. If defendant then satisfactorily performs in diversion, the trial court shall dismiss the charges. (§ 1001.36, subd. (e).) However, if the trial court does not grant diversion, or the court grants diversion but defendant fails to satisfactorily complete it (§ 1001.36, subd. (d)), then the court shall reinstate defendant's convictions and conduct further sentencing proceedings as appropriate. In all other respects, the judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

HULL, J.